80-1032
NO. .....

Supreme Court, U. S.
FILED
DEC 22 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1980

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent/Plaintiff,

vs.

FRANCIS DUANE GARTNER,

Petitioner/Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

MICHAEL D. NASATIR of
NASATIR, SHERMAN, HIRSCH & RE
9911 West Pico Boulevard, Suite 1000
Los Angeles, California 90035
Telephone (213) 277-3112

Counsel for Petitioner

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648 - (714) 536-7161

QUESTION PRESENTED

May a law enforcement officer initiate and conduct a "confirmation" search, without a warrant, of a box of private records belonging to the accused after a third party citizen has already conducted a warrantless examination of the documents contained in the closed box?

TOPICAL INDEX

	Page
Question Presented	i
Topical Index	ii
Table of Authorities Cited	iii
Petition for Writ of Certiorari	1
Official and Unofficial Reports	2
Jurisdiction	3
Statutes and Constitutional Provisions Involved	3
Statement of the Case	4
Statement of Facts	6
Reasons for Granting the Writ	7
Argument	8
Conclusion	12

TABLE OF AUTHORITIES CITED

Cases	Page
Arkansas v. Sanders, 442 U.S. 753, 99 S. Ct. 2586 (1969)	5, 9, 11
Corngold v. United States, 367 F.2d 1 (9th Cir. 1966)	8, 12
Katz v. United States, 389 U.S. 347, 88 S. Ct. 507 (1967)	8
Stoner v. California, 376 U.S. 483, 84 S. Ct. 889 (1964)	11
United States v. Chadwick, 443 U.S. 1, 97 S. Ct. 2476 (1977)	5, 9, 11
United States v. Ford, 525 F.2d 1308 (10th Cir. 1975)	8, 12
United States v. Jeffers, 342 U.S. 48, 72 S. Ct. 93 (1951)	8
United States v. Kelly, 529 F.2d 1365 (8th Cir. 1976)	8, 12
United States v. McDaniel, 574 F.2d 1224 (5th Cir. 1978), cert. denied 441 U.S. 952 (1979)	8, 12
United States v. Newton, 510 F.2d 1149 (7th Cir. 1975)	8, 12
United States v. Pryba, 502 F.2d 391 (C.A. D.C. 1974), cert. denied 419 U.S. 1127 (1975)	8, 12
United States v. United States District Court, 407 U.S. 297, 92 S. Ct. 2125 (1972)	8

TABLE OF AUTHORITIES CITED

Cases (cont'd) **Page**

Walter v. United States, 447 U.S. 67, 100 S. Ct. 2395 (1980) 5, 7, 9, 10, 11, 12

United States Constitution

Fourth Amendment 3, 5, 8, 9

Fourteenth Amendment 3, 5

Statutes (United States)

28 U.S.C. 1257 3

Statutes (California)

Penal Code
- § 470 4
- § 487.1 4
- § 1538.5 3

NO. .....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent/Plaintiff,

vs.

FRANCIS DUANE GARTNER,*

Petitioner/Defendant.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

*The parties to this proceeding consist of the Office of the Attorney General for California, 3580 Wilshire Boulevard, Room 800, Los Angeles, California 90010, and Francis Duane Gartner, located through his attorney, Michael D. Nasatir, Nasatir, Sherman, Hirsch & Re, 9911 W. Pico Boulevard, Suite 1000, Los Angeles, California.

To the United States Supreme Court, October Term, 1980:

This is a petition of FRANCIS DUANE GARTNER for a writ of certiorari to review the orders made by the Court of Appeal of the State of California, Second Appellate District, on August 4, 1980, denying petitioner's appeal, and on August 19, 1980, denying petitioner's petition for rehearing, as well as the order of the Supreme Court of the State of California on October 22, 1980, denying petitioner's petition for hearing, said appeal and petition being sought to review the orders of the Superior Court of the State of California for the County of Los Angeles entered on May 18, 1979, and June 20, 1979, denying petitioner's motion to suppress evidence, quash search warrant 14121 and traverse search warrant 14121.

OFFICIAL AND UNOFFICIAL REPORTS

To petitioner's knowledge there are no official or unofficial reports of (a) the orders of the Superior Court of the State of California, County of Los Angeles, denying petitioner's motion to suppress evidence, motion to quash search warrant and motion to traverse search warrant, entered on May 18, and July 20, 1979 (a copy of said orders has been attached hereto as Appendix "A"); (b) the order of the Court of Appeal of the State of California, Second Appellate District, on August 4, 1980, affirming petitioner's conviction (a copy of said order has been attached hereto as Appendix "B"); or (c) the order of the Supreme Court of the State of California, on October 22, 1980, denying petitioner's petition for hearing (a copy of said order has been attached hereto as Appendix "C").

JURISDICTION

1. On May 18, 1979, and July 20, 1979, the Superior Court of the State of California for the County of Los Angeles denied FRANCIS DUANE GARTNER's motion to suppress evidence. Mr. GARTNER was sentenced on July 20, 1979, and, on said date, filed a timely notice of appeal.

2. On August 4, 1980, the Court of Appeal of the State of California, Second Appellate District, entered its order affirming Mr. GARTNER's conviction.

3. On August 19, 1980, Mr. GARTNER's petition for rehearing was denied by the Court of Appeal of the State of California, Second Appellate District.

4. On October 22, 1980, Mr. GARTNER's petition for hearing in the Supreme Court of the State of California was denied.

5. There have been no motions for extension of time within which to file this petition for writ of certiorari.

6. The jurisdiction of this Court is invoked under Title 28, U.S.C. § 1257.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant portions of pertinent constitutional and statutory provisions are set forth in Appendix "D" attached hereto; they are:

1. Fourth Amendment to the United States Constitution;
2. Fourteenth Amendment to the United States Constitution;
3. California Penal Code § 1538.5.

STATEMENT OF THE CASE

On June 1, 1978, an Information was filed in the Superior Court of Los Angeles County charging petitioner with violations of California Penal Code § 487.1 and § 470, grand theft and forgery. A plea of not guilty was entered to all counts of the Information.

On July 28, 1978, petitioner filed a Notice of Motion and Motion to Traverse and Quash Search Warrant and to Suppesss Evidence, alleging violations of the United States and California Constitutions (C.T. 1066-1070[1]). On October 3, 1978, a supplement to this motion, with extensive points and authorities, was filed (C.T. 1072). On December 20, 1978, the prosecution filed its opposition points and authorities (C.T. 1157), and on December 22, 1978, petitioner filed his reply to the opposition.

On March 20, 1979, a stipulation was entered into to submit the motion to suppress, quash and traverse on a partial transcript of the preliminary hearing (C.T. 1179).

On March 26, 1979, petitioner filed additional supplemental authorities (C.T. 1183).

On May 18, 1979, petitioner's motion to suppress, quash and traverse was denied (C.T. 1194, R.T. 26[2]).

On July 20, 1979, petitioner filed a notice of motion and renewed motion to suppress evidence, based upon newly

---

[1]C.T. will be used here, and hereafter, to refer to the Clerk's Transcript on Appeal.

[2]R.T. will be used here, and hereafter, to refer to the Reporter's Transcript on Appeal.

discovered case law (C.T.B. 44[3]). On that day the Superior Court considered and denied said motion (C.T. 1195, R.T. 40[5]).

The validity of the warrantless search and seizure by law enforcement officials of the box of records belonging to petitioner, under the Fourth and Fourteenth Amendments to the United States Constitution, was raised by petitioner before the Court of Appeal of the State of California, Second Appellate District, in petitioner's Opening Brief and again in his Reply Brief,by relying, in part, upon *Arkansas v. Sanders,* 442 U.S. 753, 99 S. Ct. 2586 (1979), and *United States v. Chadwick,* 433 U.S. 1, 97 S. Ct. 2476 (1977).

On August 4, 1980, the Court of Appeal of the State of California, Second Appellate District, filed its opinion affirming petitioner's conviction and upholding the validity of the warrantless search (Appendix "B"). A timely petition for hearing was filed with the Supreme Court of the State of California on September 15, 1980, raising the validity of the warrantless search under the Fourth and Fourteenth Amendments, relying upon *Walter v. United States,* 447 U.S. 67, 100 S. Ct. 2395 (1980); *Arkansas v. Sanders, supra;* and *Chadwick v. United States, supra.* Said petition for hearing alleging violations of the Fourth and Fourteenth Amendment rights was denied on October 22, 1980 (Appendix "C").

---

[3]C.T.B. will be used here and hereafter, to refer to Volume II of the Supplemental Clerk's Transcript on Appeal.

[4]A copy of the original Notice of Motion and Motion to Traverse and Quash Search Warrant; to Suppress Evidence (California Penal Code Section 1538.5; 1539; 1540) is attached as Appendix "E", to establish that the "federal question" was raised in the Superior Court of the State of California.

STATEMENT OF FACTS

While investigating FRANCIS DUANE GARTNER, a Los Angeles County Deputy Sheriff contacted a business competitor of GARTNER's and questioned this competitor about GARTNER. The business competitor informed the Deputy Sheriff that he (competitor) had recently examined private records of GARTNER's that had "inadvertently" been delivered to the competitor's office by a moving company. The competitor explained that he had purchased a casualty insurance business from Mr. GARTNER and, after purchasing this business, petitioner GARTNER moved from his old offices into the competitor's previous office and the competitor moved from his (competitor's previous office) into new and different offices. The same moving company conducted the move for both individuals on the same date. This box of records examined by the business competitor was mistakenly delivered to the business competitor's new offices when it should have been taken to the competitor's previous offices which were now frequented by petitioner GARTNER. (C.T. 470, 478, 487.) These records were examined by the business competitor because he was "curious" about these records.

The Deputy Sheriff did not seek judicial approval or conduct any further investigation. Instead, he went to the competitor's storeroom, opened a box of records (knowing that the records belonged to petitioner), removed a file and reviewed and examined approximately 100 to 200 private records of petitioner's contained in the file. (C.T. 502.) At the Deputy Sheriff's request the competitor photocopied many of these records and gave these photocopies to the

Deputy Sheriff (C.T. 504). The Deputy Sheriff returned to the competitor's place of business during the next six to eight weeks, continued to review the records, and obtained additional photocopies of said records (C.T. 506, 507). Prior to the issuance of search warrant 14121, petitioner attempted to obtain his records from the competitor but was told by the business competitor that the Sheriff's Department had requested that the records not be returned to petitioner GARTNER (C.T. 480, 481).

It was acknowledged by all parties that the fruits of the Deputy Sheriff's warrantless search of the private records were relied upon in the affidavit in support of search warrant 14121 (C.T. 466, 472, 479, 490, 502, 505, 506). The Superior Court of the State of California for the County of Los Angeles recognized that the search warrant affidavit would be constitutionally insufficient to authorize the warrant if the fruits of these warrantless searches by the Deputy Sheriff were excised from the affidavit (R.T. 23).

REASONS FOR GRANTING THE WRIT

This petition for writ of certiorari provides this Honorable Court with the opportunity to resolve a question left open by this Court last term in *Walter v. United States, supra,* 447 U.S. 67, 100 S. Ct. 2395 (1980); i.e., whether the government may reopen and search a package previously examined but then closed by a private party (see Mr. Justice Stevens' opinion [100 S. Ct. at 2402 and n. 9] and Mr. Justice White's concurring opinion [100 S. Ct. at 2404, n. 3]), and it would be instrumental in resolving a conflict between various United States Courts of Appeals regarding the extent of a warrantless

government agent search after a prior search by a private individual. *Compare, United States v. Kelly*, 529 F.2d 1365 (8th Cir. 1976); *United States v. Newton*, 510 F.2d 1149 (7th Cir. 1975), and *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966), *with United States v. McDaniel*, 574 F.2d 1224 (5th Cir. 1978), *cert. denied* 441 U.S. 952 (1979); *United States v. Ford*, 525 F.2d 1308 (10th Cir. 1975), and *United States v. Pryba*, 502 F.2d 391 (C.A. D.C. 1974), *cert. denied* 419 U.S. 1127 (1975). The question of the validity of a subsequent warrantless search of a closed package by a government agent after a prior search by a private individual needs to be resolved by this Honorable Court to eliminate the confusion and contradictory rulings presently being rendered by the lower federal courts and the state courts.

ARGUMENT

The Court has previously ruled that the "warrant clause" of the Fourth Amendment is to be read in conjunction with the "unreasonable search and seizure" clause when Fourth Amendment rights are alleged to have been violated. *United States v. United States District Court*, 407 U.S. 297, 92 S. Ct. 2125, 2136 (1972). The absence of a warrant makes the search "*per se* unreasonable" *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 514 (1967). The burden has been placed on those seeking an exception to the warrant requirement to show the need for said exception. *United States v. Jeffers*, 342 U.S. 48, 72 S. Ct. 93, 95 (1951).

Recently, this Court has differentiated between containers of personal property (as in this case) and automobiles

and, in the former situation, has required a search warrant to search containers of personal property when said containers are effectively under the control of law enforcement officials, notwithstanding the fact that the container is presently located at law enforcement "headquarters" (*United States v. Chadwick, supra,* 433 U.S. 1, 97 S. Ct. 2476) or whether the container is located "in the field" (*Arkansas v. Sanders, supra,* 442 U.S. 753, 99 S. Ct. 2586). Both *Sanders* and *Chadwick* recognized that law enforcement officials had abundant probable cause to search the containers of personal property, but it was determined that probable cause alone was insufficient to justify the warrantless invasion of personal privacy.

After *Sanders* and *Chadwick*, it appeared that a "confirmation" search, such as that conducted by the Deputy Sheriff in the instant case, was clearly prohibited. The status of this "confirmatory" search under the Fourth Amendment was then discussed, but left unresolved, by this Court in *Walter v. United States, supra,* 447 U.S. 67, 100 S. Ct. 2395 (1980), where this Court held unconstitutional the opening of a package containing "obscene" reels of film and the viewing of said reels of film on a movie projector, without a warrant, after a private individual had previously opened the package but had not actually viewed the contents on the film. The Court, however, left unclear that status of a warrantless search by law enforcement officials when said search was only conducted to the extent that the private party had previously searched: Mr. Justice Stevens and Mr. Justice Stewart suggest that the "plain view" examination of the contents of the package that had already been examined by third parties might

be allowable (100 S. Ct. at 2401), but this question was reserved for a future decision (100 S. Ct. at 2402, n. 9). Mr. Justice Marshal concurred in the judgment. Mr. Justice White and Mr. Justice Brennan concurred in the judgment but were of the opinion that any viewing by governmental agents would only be proper without a warrant if the private party had left the package in such a state that the contents of the package were in "plain view" for inspection by law enforcement officials and, if the contents were not in "plain view," a search warrant would be required (100 S. Ct. at 2404, n. 3). Mr. Justice Blackmun, the Chief Justice, Mr. Justice Powell and Mr. Justice Rehnquist were of the opinion that a warrant would not be required to search packages previously searched by a private individual (100 S. Ct. at 2405, 2406).

The warrantless search conducted by the Deputy Sheriff in the instant case presents this Court with the issue unresolved in *Walter v. United States, supra.* The Deputy Sheriff, while conducting an investigation, went to a business competitor of petitioner GARTNER. While interviewing the business competitor, the Deputy Sheriff learned that private, non-contraband business records belonging to petitioner GARTNER had been mistakenly delivered to the business competitor's office by a moving company, that the business competitor had reviewed these records, and that the business competitor was "curious" about the records. Knowing that the records belonged to petitioner GARTNER and not to the business competitor, the Deputy Sheriff entered the room containing the records, opened the box containing the records, removed a file from the box, opened the file and then reviewed the business

records. It is quite clear that this was not a "plain view" examination by the Deputy Sheriff and that the Deputy Sheriff did not conduct this search under the impression that the business competitor could give consent to search the records. See *Stoner v. California*, 376 U.S. 483, 84 S. Ct. 889 (1964).

It appears to be evident that this warrantless "confirmation" search is unconstitutional. A contrary view would allow the police to conduct a warrantless search of a residence under the following hypothetical situation:

> An informant, who has provided information to law enforcement agents over a period of years, is also a burglar; this informant enters a residence, removes valuable jewelry from the residence, and while in the residence, observes a large quantity of marijuana. Some time after leaving the residence the burglar/informant is arrested by law enforcement officials; the burglar/informant then tells law enforcement officials about the marijuana he viewed within the residence.

It is undisputed that a warrant would be required in this situation, even though law enforcement officials knew what was located within the residence. There appears to be no reason why a container of personal property, given the protection of the search warrant requirement in *Sanders, supra,* and *Chadwick, supra,* should be allowed to be searched without a warrant, even though the privacy of the container had been invaded by a private citizen, if the container is now closed.

Aside from the fact that this important constitutional question was unresolved in *Walter, supra,* it is critical that

this Court resolve this question to clarify the law on this point, to eliminate the present conflict amongst the circuits in the United States Courts of Appeals. *United States v. Kelly, supra; United States v. Newton, supra; Corngold v. United States, supra; United States v. McDaniel, supra; United States v. Ford, supra;* and *United States v. Pryba.*

CONCLUSION

Petitioner's conviction was based upon evidence obtained in executing a search warrant when the information in the affidavit in support of the search warrant was obtained by a prior warrantless search by a Deputy Sheriff. It was admitted throughout the prosecution in the state courts that the evidence relied upon in the prosecution would have been unconstitutionally obtained if the prior warrantless search by the Deputy Sheriff was unconstitutional. This case presents this Honorable Court with the opportunity to determine the constitutionality of a "confirmation" search, the legality of which was left unresolved by this Court's recent decision in *Walter v. United States, supra.* It is respectfully submitted that this Court should take this opportunity to resolve this question, to provide guidance to the lower federal courts and the state courts on this important constitutional issue.

Respectfully submitted,

MICHAEL D. NASATIR

NASATIR, SHERMAN, HIRSCH & RE

Counsel for Petitioner

INDEX TO APPENDIXES

		Page
"A"	Orders of the Superior Court of the State of California, County of Los Angeles, denying petitioner's motion to suppress evidence, motion to quash search warrant and motion to traverse search warrant entered on May 18 and July 20, 1979	1
"B"	Order of the Court of Appeal of the State of California, Second Appellate District, affirming petitioner's conviction, filed August 4, 1980	3
"C"	Order of the Supreme Court of the State of California denying petitioner's petition for hearing, filed October 22, 1980	10
"D"	Pertinent portions of statutes and constitutional provisions involved	
	Fourth Amendment	11
	Fourteenth Amendment	11
	California Penal Code § 1538.5	12
"E"	Notice of Motion and Motion to Traverse and Quash Search Warrant; to Suppress Evidence (California Penal Code Section 1538.5, 1539; 1540), filed July 28, 1978 ..	13

2 TRL/MOT

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

1194

114

Date MAY 16 1979 HONORABLE: STANLEY R MALONE JR JUDGE / S DUCKE Deputy Sheriff | J LESNICK M ACHAHON DEPT. | Deputy Clerk / Reporter

201

CASE NO. A341639

(Parties and counsel checked if present) Counsel for People: R Fields ✓

PEOPLE OF THE STATE OF CALIFORNIA VS 01 GARTNER FRANCIS DUANE ✓

DEPUTY DISTRICT ATTY:

Counsel for Defendant: M NASATIR ✓

CHARGE 487.1 14CTS 470 39CTS

(BOX CHECKED IF ORDER APPLICABLE)

NATURE OF PROCEEDINGS

31 ☐ ---, ---, ---, 1538.5(a) ET AL ---, --- HELD OR 6-1-79

32 ☐ DUE TO CONFLICT OF INTERESTS, PUBLIC DEFENDER RELIEVED. PURSUANT TO SECTION 987.2 PENAL CODE, _____ IS APPOINTED.

33 ☐ ON PEOPLE'S MOTION, AMENDMENT TO / AMENDED INFORMATION FILED/DEEMED FILED/INFORMATION AMENDED BY INTERLINEATION/AS FOLLOWS: _____

34 ☐ ON _____ MOTION, CASE A _____ CONSOLIDATED WITH CASE A _____ AS COUNT(S) _____ THEREOF. SEE CASE A _____ FOR FURTHER PROCEEDINGS.

35 ☐ MOTION PURS. SECT. 995 P.C. GRANTED DENIED WITHDRAWN/CONTINUED TO _____

36 ☒ MOTION PURS. SECT. 1538.5 P.C. CALLED FOR HEARING. ☒ MOTION SUBMITTED PER STIPULATION NO. 40 BELOW.

37 ☐ DEFENDANT ADVISED OF CONSTITUTIONAL RIGHTS AND EFFECT OF PRIOR CONVICTIONS. DEFENDANT WAIVES RIGHTS AND ADMITS PRIOR(S) NO. _____

38 ☐ CAUSE IS CALLED FOR TRIAL. ☐ CAUSE SUBMITTED PER STIPULATION (NO. 40) BELOW.

39 ☒ DEFENDANT PERSONALLY AND ALL COUNSEL WAIVE TRIAL BY JURY. COURT ACCEPTS WAIVER.

40 ☒ By stipulation of defendant and all counsel issue is submitted on the testimony contained in the transcript of the proceedings had at the preliminary hearing, subject to this court's rulings, with each side reserving the right to offer additional evidence and all stipulations entered into at the preliminary hearing be deemed entered into in these proceedings. It is further stipulated that all exhibits received or marked for identification at the preliminary hearing are received in evidence and marked for identification in these proceedings bearing the same number as used in the preliminary hearing, subject to this court's rulings. People's exhibit _____ Preliminary Transcript) admitted into evidence by reference. _____

41 ☒ Defendant advised and personally waives his right to confrontation of witnesses for the purpose of further cross-examination, and waives privilege against self-incrimination.

42 ☒ COURT STATES IT HAS READ AND CONSIDERED TRANSCRIPT OF PRELIMINARY HEARING.

43 ☒ Search warrants; Affidavit to Search Warrant; Return to Search Warrant marked defendant's exhibit F collectively by reference to the copy in the legal file

44 ☒ MOTION PURS. SECT. 1538.5 P.C. GRANTED ~~DENIED/WITHDRAWN/CONTINUED~~ 1538 and 1540 Penal Code denied

45 ☐ ALL SIDES REST. COUNSEL WAIVE ARGUMENT/ARGUE AND CAUSE IS SUBMITTED.

46 ☐ COURT FINDS DEFENDANT NOT GUILTY _____

47 ☐ COURT FINDS DEFENDANT GUILTY AS CHARGED TO SECT(S) _____ IN COUNTS(S) _____ ☐ LESSER INCLUDED/RELATED OFFENSE.

48 ☐ PRE-TRIAL CONFERENCE HELD/OFF CALENDAR/CONTINUED TO _____

49 ☐ THE COURT, DUE TO CONGESTED CALENDAR, TRAILS TRIAL _____ TO A DATE NOT LATER THAN _____, OR TO SUCH EARLIER DATE AS A TRIAL COURT IS AVAILABLE.

50 ☐ ON _____ MOTION, TRIAL _____ IS CONTINUED TO/REMAINS _____ AT _____ A.M., IN DEPT. _____

51 ☐ DEFENDANT PERSONALLY AND ALL COUNSEL WAIVE TIME FOR TRIAL.

52 ☐ CAUSE TRANSFERRED TO DEPT. _____ ON _____ AT _____ A.M. FOR _____

53 ☐ WITNESS(ES) INSTRUCTED TO RETURN ON ABOVE DATE: _____

54 ☒ DEFENDANT PERSONALLY WITHDRAWS PLEA OF NOT GUILTY TO COUNT(S) _____ PLEA(S) G-I-S.

55 ☒ PLEADS GUILTY, NOLO CONTENDERE, WITH CONSENT OF DISTRICT ATTORNEY AND APPROVAL OF COURT, TO VIOLATION OF SECT(S) 487.1 and 470 Penal Code _____ TO COUNT(S) I and IV _____ LESSER INCLUDED/RELATED OFFENSE.

56 ☒ DEFENDANT WAIVES TIME FOR SENTENCE, REFERRED TO PROBATION DEPARTMENT.
PROBATION AND SENTENCE HEARING SET 6-20-79 AT 9 A.M., INCLUDING
☒ DISPOSITION OF COUNTS I, II, III, IV, V REMAINING
☐ DETERMINATION OF PRIORS ALLEGED/DEGREE/ARMED/USE ALLEGATION.

57 ☐ DEFENDANT WAIVES PROBATION REFERRAL, REQUESTS IMMEDIATE SENTENCE.
(SEE SENTENCE BELOW-SEE ATTACHED SHEET)

58 ☐ FURTHER ORDER AS FOLLOWS: _____

59 ☐ DEFENDANT FAILS TO APPEAR WITH/WITHOUT SUFFICIENT EXCUSE. ☐ BAIL FORFEITED ☐ O.R. REVOKED.

60 ☐ BENCH WARRANT ORDERED ISSUED/AND HELD UNTIL _____ NO BAIL, BAIL FIXED AT $ _____

61 ☒ DEFENDANT APPEARING, BENCH WARRANT ORDERED RECALLED QUASHED, RECALLED _____

62 ☐ UPON PAYMENT OF $ _____ COSTS BEFORE _____ AND FILING OF REASSUMPTION, ORDER OF _____ FORFEITING BAIL IS TO BE VACATED AND BAIL REINSTATED.

63 ☐ REASSUMPTION FILED COSTS PAID (RECEIPT NO. _____). BAIL REINSTATED.

64 ☐ DEFENDANT'S MOTION FOR RELEASE ON O.R., REDUCTION OF BAIL IS GRANTED. DENIED.

65 ☐ BAIL RESET AT $ _____

☐ REMANDED ☐ BAIL ☐ BAIL EXON. DATE INFORMATION OR INDICTMENT FILED: _____

☐ RELEASED ☒ O.R. ☐ DISCHARGED ☐ IN CUSTODY OTHER MATTER.

MINUTES ENTERED 5-18-79 COUNTY CLERK

2 TRL/MOT

SDC 999-C144 (REV 12-79)

MINUTE ORDER

APPENDIX

A 2 3 P & S

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES 1195

1:4

Date JULY 20 1979 DEPT. J LESNICK

HONORABLE: STANLEY P MALONE JR JUDGE / Louis P Simeon Deputy Sheriff

M MCMAHON Deputy Clerk / Reporter

CASE NO. A341638 (Parties and counsel checked if present)

PEOPLE OF THE STATE OF CALIFORNIA Counsel for People: a Field

VS DEPUTY DISTRICT ATTY:

CHARGE 01 GARTNER FRANCIS DUANE Counsel for Defendant: M NASATIR

487.1 14CTS 470 09CTS

(BOX CHECKED IF ORDER APPLICABLE)

X-797343

NATURE OF PROCEEDINGS

71 ☒ Motion to strike pursuant to 1538.5 Penal Code motion denied 06-01-78.

72 ☐ _____ IS SWORN AS THE ENGLISH/_____ INTERPRETER.

73 ☐ CRIMINAL PROCEEDINGS ADJOURNED/RESUMED.

74 ☐ DEFENDANT ORDERED DELIVERED TO DEPARTMENT OF CORRECTIONS PER SECTION 1203.03 PENAL CODE.

75 ☐ ON _____ MOTION, PROBATION AND SENTENCE HEARING CONTINUED TO _____

AT _____ A.M. IN DEPT. _____ ☐ SUPPLEMENTAL PROBATION REPORT/PROGRESS REPORT ORDERED.

76 ☐ DEFENDANT PERSONALLY AND ALL COUNSEL WAIVE TIME FOR SENTENCING.

77 ☒ PROBATION DENIED. SENTENCE IS IMPOSED AS FOLLOWS:

☒ IMPRISONED IN STATE PRISON FOR ☐ TERM PRESCRIBED BY LAW, ☒ TOTAL OF TWO YEARS.

☒ COURT SELECTS THE middle TERM OF two YEARS FOR THE BASE TERM AS TO COUNT I

☐ PLUS _____ YEARS AS ENHANCEMENT (SEE BELOW). As Count IV - concurrent with Count I

☐ COMMITTED TO CALIFORNIA YOUTH AUTHORITY FOR A PERIOD NOT TO EXCEED _____ YEARS.

☐ IMPRISONED IN LOS ANGELES COUNTY JAIL FOR TERM OF _____

☐ FINED IN SUM OF $ _____ PLUS PENALTY ASSESSMENT, TO BE PAID TO COUNTY CLERK.

78 ☒ SENTENCE IS SUSPENDED.

79 ☐ PROCEEDINGS SUSPENDED.

80 ☒ PROBATION GRANTED FOR A PERIOD OF 5 YEARS. (SEE CONDITIONS LISTED BELOW).

81 ☐ PROBATION TO BE WITHOUT FORMAL SUPERVISION.

1 ☒ SPEND FIRST 180 DAYS IN COUNTY JAIL. ☐ ROAD CAMP OR HONOR FARM RECOMMENDED.
☐ WORK FURLOUGH PROGRAM RECOMMENDED. ☐ NOT TO BE ELIGIBLE FOR COUNTY PAROLE.

2 ☐ PAY FINE OF $ _____ P.A. TO COUNTY CLERK/PROBATION OFFICER IN SUCH MANNER AS HE SHALL PRESCRIBE

3 ☐ MINIMUM PAYMENT OF FINE/RESTITUTION TO BE $ _____

4 ☒ MAKE RESTITUTION THROUGH P.O. IN SUCH AMOUNT AND MANNER AS OFFICER SHALL PRESCRIBE.

5 ☐ NOT DRINK ANY ALCOHOLIC BEVERAGE AND STAY OUT OF PLACES WHERE THEY ARE THE CHIEF ITEM OF SALE.

6 ☐ NOT USE OR POSSESS ANY NARCOTICS, DANGEROUS OR RESTRICTED DRUGS OR ASSOCIATED PARAPHERNALIA, EXCEPT WITH VALID PRESCRIPTION, AND STAY AWAY FROM PLACES WHERE USERS CONGREGATE.

7 ☐ NOT ASSOCIATE WITH PERSONS KNOWN BY YOU TO BE NARCOTIC OR DRUG USERS OR SELLERS.

8 ☐ SUBMIT TO PERIODIC ANTI-NARCOTIC TESTS AS DIRECTED BY THE PROBATION OFFICER.

9 ☐ HAVE NO BLANK CHECKS IN POSSESSION, NOT WRITE ANY PORTION OF ANY CHECKS, NOT HAVE BANK ACCOUNT UPON WHICH YOU MAY DRAW CHECKS.

10 ☐ NOT GAMBLE OR ENGAGE IN BOOKMAKING ACTIVITIES OR HAVE PARAPHERNALIA THEREOF IN POSSESSION, AND NOT BE PRESENT IN PLACES WHERE GAMBLING OR BOOKMAKING IS CONDUCTED.

11 ☐ NOT ASSOCIATE WITH _____

12 ☒ COOPERATE WITH PROBATION OFFICER IN A PLAN FOR Continued psychotherapy

13 ☐ SUPPORT DEPENDENTS AS DIRECTED BY PROBATION OFFICER.

14 ☒ SEEK AND MAINTAIN TRAINING, SCHOOLING OR EMPLOYMENT AS APPROVED BY PROBATION OFFICER.

15 ☒ MAINTAIN RESIDENCE AS APPROVED BY PROBATION OFFICER.

16 ☐ SURRENDER DRIVER'S LICENSE TO CLERK OF COURT TO BE RETURNED TO D.M.V.

17 ☐ NOT DRIVE A MOTOR VEHICLE UNLESS LAWFULLY LICENSED AND INSURED.

18 ☐ NOT OWN, USE OR POSSESS ANY DANGEROUS OR DEADLY WEAPONS.

19 ☐ SUBMIT HIS PERSON AND PROPERTY TO SEARCH OR SEIZURE AT ANY TIME OF THE DAY OR NIGHT BY ANY LAW ENFORCEMENT OFFICER WITH OR WITHOUT A WARRANT.

20 ☒ OBEY ALL LAWS, ORDERS, RULES AND REGULATIONS OF THE PROBATION DEPARTMENT AND OF THE COURT.

82 ☒ DEFENDANT TO BE GIVEN CREDIT FOR 110 DAYS IN CUSTODY.

83 ☐ SENTENCE/COUNTS TO RUN CONSECUTIVELY/CONCURRENTLY WITH _____

84 ☒ STAY OF EXECUTION GRANTED TO 7-25-79 at 12 noon

85 ☐ PURSUANT TO SEC. 17 PENAL CODE, OFFENSE IS DEEMED TO BE A MISDEMEANOR.

86 ☒ ON MOTION OF PEOPLE, COUNTS II, III, IV - XXIII DISMISSED IN FURTHERANCE OF JUSTICE.

87 ☐ COURT ADVISES DEFENDANT OF HIS APPEAL RIGHTS.

88 ☐ COURT ADVISES DEFENDANT OF HIS PAROLE RIGHTS.

89 ☒ FURTHER ORDER AS FOLLOWS/ADDITIONAL CONDITIONS OF PROBATION:

Restitution to all persons that submit a claim to the Probation Officer within Sixty months. Restitution of pictures consisting of six pages marked "Exhibit 1" by reference and a picture sent in evidence by the defendant to amounts shall be fixed by the Court in the regular course of probation proceedings. Pursuant to Section 1463.7 - Government Code the defendant shall pay $10 for each day penalty assessment through Probation Officer. Time permitted to state in denial by Court a "home leave" condition defendant shall perform 30 hours per week community service for 2 years as directed by Probation Officer.

Notice of Appeal Received - bail on appeal set at $5,000.00

90 ☐ DEFENDANT FAILS TO APPEAR WITH/WITHOUT SUFFICIENT EXCUSE. ☐ BAIL FORFEITED ☐ O.R. REVOKED

91 ☐ BENCH WARRANT ORDERED ISSUED AND HELD UNTIL _____ ☐ NO BAIL ☐ BAIL FIXED AT $ _____

92 ☐ DEFENDANT APPEARING, BENCH WARRANT (ORDERED) RECALLED/QUASHED.

93 ☐ WARRANT/WARRANT ADMINISTRATIVE FEE _____ ADD'L _____ DMV _____ WRITTEN _____

☒ REMANDED ☒ BAIL Appeal LARD _____ CR _____ CYA _____ FLR _____

☐ RELEASED ☐ O.R. CO _____ MINUTES ENTERED 7-20-79 COUNTY CLERK

MINUTE Sheriff _____ Prvc. _____ Misc. _____ 3 P & S

APPENDIX "A" p. 2

ORDER AFFIRMING PETITIONER'S CONVICTION

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. FRANCIS DUANE GARTNER, Defendant and Appellant.

2 CRIM. NO. 35858 (Super. Ct. No. A341638)

CERTIFIED FOR PUBLICATION

[FILED AUGUST 4, 1980]

APPEAL from a judgment of the Superior Court of Los Angeles County. Stanley R. Malone, Jr., Judge. Affirmed.

Michael D. Nasatir, and Nasatir, Sherman, Hirsch & Re, for Defendant and Appellant.

George Deukmejian, Attorney General, Robert H. Philibosian, Chief Assistant Attorney General–Criminal Division, S. Clark Moore, Assistant Attorney General, Shunji Asari and Mark Alan Hart, Deputy Attorneys General, for Plaintiff and Respondent.

NATURE OF CASE:

On his plea of no contest, appellant was convicted of grand theft and forgery. On his appeal, permitted under Penal Code section 1538.5 (m), he challenges the trial court's denial of his motion to suppress. The issue raised is whether

the examination of private business records by a private citizen was or became state action, requiring suppression of the evidence discovered thereby.

FACTS:

The affidavit supporting the search warrant in this case alleged the following facts: on June 10, 1977, Donald Parton of Parton Oil Company, the victim in count one, received from an anonymous sender an envelope containing invoices indicating refunds to Parton's firm totaling $8,732 on two insurance policies each of which had been issued to the firm by two separate insurance companies through appellant's casualty insurance agency. Parton in fact never received any refund. When he contacted Henry Marvin, an insurance agent for appellant, Marvin verified the fact that refunds were due to Parton's firm. Parton then filed a complaint with the Antelope Valley Sheriff.

In the course of his investigation, Deputy Sheriff Robert Henley was told by Henry Marvin that appellant had, for his own benefit, appropriated the refunds due Parton. Deputy Henley then contacted Jack Boyer, the new owner of appellant's insurance agency since June 2, 1977. Boyer told the deputy that his purchase of appellant's agency included the files for the period covering 1972 to 1977, that during the move some of appellant's records, which also covered that same period, were inadvertently left with Boyer by the movers, and that when Boyer went through those records, he discovered that from 1972 to 1977 appellant had regularly appropriated for his own use monies due various policyholders who had

insurance coverage through his agency. From records subsequently shown him by Boyer, Deputy Henley compiled a list[1] of 177 policyholders whose refunds due them appeared to have been used by appellant for his own benefit. Thirteen of these policyholders were contacted by Deputy Henley; all acknowledged never having received any refund. In going through the records Boyer had showed him, Deputy Henley also discovered that in some cases appellant used the refunds to pay for life insurance policies he took out on the policyholders. When Deputy Henley talked to these policyholders, they told him they had never applied for such life insurance.

Linda Warden, one of appellant's employees, told Deputy Henley she had personally observed appellant forge policyholders' signatures on refund checks and on applications for loans and life insurance. On several occasions Warden had, on appellant's orders, forged policyholders' names on loan applications. Warden informed Deputy Henley of 16 specific instances where appellant had misappropriated policyholders' funds. Deputy Henley interviewed six of these policyholders; they all corroborated the information given previously by Warden.

Based on his experience as a fraud investigator and the information known to him, Deputy Henley concluded there was probable cause to believe that appellant had committed the crimes of forgery and grand theft. Accordingly, Deputy Henley applied for a search warrant, authorizing a search of appellant's office for specified documents pertaining to those policyholders who appeared to have been victimized by appellant's dishonest actions. A magistrate concluded there

---

[1]The list was attached to the affidavit.

was probable cause and issued the warrant.

DISCUSSION:

Appellant contends that since the documents in Jack Boyer's possession at the time of the allegedly illegal search complained of belonged to appellant, Boyer was without authority to permit Deputy Henley access to those records. Hence, appellant argues, those documents were obtained in violation of his right to privacy. We reject appellant's contention.

The conduct of a person not acting under the authority of a governmental unit or agency is not proscribed by either the federal or the California Constitution. (*People v. Zelinski* (1979) 24 Cal. 3d 357, 365; *Soli v. Superior Court* (1980) 103 Cal. App. 3d 72, 83; *People v. Katzman* (1968) 258 Cal. App. 2d 777, 786) Thus, acquisition of property by a private citizen from another person cannot be deemed reasonable or unreasonable and in such a situation Penal Code section 1538.5, which concerns only the suppression of evidence obtained by government agents, not private individuals acting on their own initiative, has no application. (*People v. Superior Court (Smith)* (1969) 70 Cal. 2d 123, 128-129.)

In applying the exclusionary rule to evidence improperly acquired by government officials, the courts have emphasized that the rule serves to deter unlawful conduct on the part of such agencies by removing the incentive to disregard it. For instance, in the case of an organized police force it is assumed that its officers will have knowledge of the exclusionary rule as a result of directives from the higher echelons and that their desire to secure convictions, coupled with their

discipline, will produce compliance with the rule. (*People v. Botts* (1967) 250 Cal. App. 2d 478, 482.) On the other hand, except in unusual cases, we cannot assume that private citizens have knowledge of the exclusionary rule, that they are under any disciplinary compulsion to obey such a rule, or that they will not be motivated in their conduct by reasons other than, or in addition to, a desire to assist in obtaining a criminal conviction. (*Ibid.*) To apply the exclusionary rule in the latter instance would result in letting the guilty go free without any assurance that similar conduct will be restrained in the future. (*Id.* at pp. 482-483.)

In determining whether a citizen acted as an agent of the state, deference must be given to the findings of the court below. (*People v. Topp* (1974) 40 Cal. App. 3d 372, 377.)

The record in this case establishes that Boyer was acting on his own initiative when he went through the files in question, inadvertently left with Boyer by the movers. Evidence introduced at the preliminary hearing[2] showed that Boyer's search of the records was prompted by a letter he received from Aetna Life and Casualty Company regarding a dividend check that appellant allegedly had failed to give to a policyholder and asking Boyer to check the records. At the time Deputy Henley talked to Boyer, the latter had already gone through those files and discovered appellant's misappropriation of policyholders' funds. When Boyer, after being contacted by Deputy Henley, revealed this information to the deputy and provided him access to the files in question, there was no impermissible state action.

---

[2]Appellant's suppression motion under Penal Code section 1538.5, pursuant to a stipulation, was submitted on part of the transcript of the preliminary hearing.

The fact that Boyer showed the files to Deputy Henley only after he had been contacted by the deputy did not transform Boyer's actions into "state" action, as appellant is claiming. The relevant question is not who initiated the contact but who initiated the search. (*People v. Pranke* (1970) 12 Cal. App. 3d 935, [after police told the defendant's friend they were looking for the defendant in connection with a burglary investigation, the friend invited the officers into his apartment to check over certain property which the defendant had left in his custody–judgment of conviction upheld].)

As to appellant's argument that Jack Boyer was under a duty to return the files to appellant after appellant made such a request prior to the issuance of the serach warrant, nothing in the law suggests that a citizen who finds contraband or evidence of a crime is under a duty to return such property to the perpetrator of the crime. It appears that in this case Boyer merely delayed the return of the files in question until the police had obtained a search warrant. In any event, any delay in Boyer's return of the records to appellant is not dispositive of the issue before us.

Here, as we have seen, whatever violation there was of appellant's right of privacy, if any, took place prior to any police action, when Boyer, prompted by an inquiry of one of the insurance companies, went through the records and discovered appellant's dishonest conduct. As we stated earlier, in those situations where the challenged evidence was obtained by a private citizen, acting on his own, the courts have refused to apply the exclusionary rule. (*People v. Superior Court, supra,* 70 Cal. 2d 123, 128-129; *People v. Sahagun* (1979) 89 Cal. App. 3d 1, 19; *People v. Botts, supra,* 250 Cal. App. 2d

478, 481.)

We agree with the trial court that Boyer's actions did not constitute state action. The evidence concerning Deputy Henley's observations of appellant's records, furnished to the deputy by Boyer, was therefore properly admitted. (*People v. Topp. supra*, 40 Cal. App. 3d 372, 377-378.) There was no error. Other issues which we deem unsubstantial we have considered and discussed in a separate written memorandum contemporaneously filed with this opinion.

The judgment of conviction [order granting probation] is affirmed.

CERTIFIED FOR PUBLICATION

BEACH, J.

We concur:

ROTH, P. J.

FLEMING, J.

APPENDIX "C"

ORDER DENYING HEARING

After Judgment By The Court Of Appeal
2nd District, Division 2, Crim. No. 35858

In the Supreme Court of the State of California
IN BANK
PEOPLE v. GARTNER

[FILED OCTOBER 22, 1980]

Appellant's petition for hearing DENIED.

BIRD,
Chief Justice

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT IV–SEARCHES AND SEIZURES

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT XIV–CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION: . . . .

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

CALIFORNIA PENAL CODE

§ 1538.5 Motion to return property or suppress evidence

"(a) Grounds

(a) A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

"(1) The search or seizure without a warrant was unreasonable.

"(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; * * * (v) there was any other violation of federal or state constitutional standards.

" . . .

"(m) Exclusive pre-trial remedy; review on appeal after conviction

(m) The proceedings provided for in this section, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review

of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

" . . . . "

APPENDIX "E"

NOTICE OF MOTION AND MOTION TO TRAVERSE AND QUASH SEARCH WARRANT; TO SUPPRESS EVIDENCE (CALIFORNIA PENAL CODE SECTION 1538.5; 1539; 1540)

In the Superior Court of the State of California for the County of Los Angeles.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. FRANCIS DUANE GARTNER, Defendant.

NO. A 341638

[FILED JULY 28, 1978]

TO THE CLERK OF THE ABOVE ENTITLED COURT AND TO THE PEOPLE OF THE STATE OF CALIFORNIA AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that the Defendant FRANCIS DUANE GARTNER will move on August 28, 1978 at the hour of 9:00 a.m. or as soon thereafter as counsel may be heard in Department 130 of the above entitled court, and hereby does move to quash the search warrant issued for the offices located at 23550 Lyons Avenue, Suite 204 and 205, Valencia, California and the offices of Jack Boyer, located at 2354 Lyons Avenue, Valencia, California, and based upon the affidavit of Robert Henley, Deputy Sheriff for the County of Los Angeles. This motion further seeks pursuant to California Penal Code Section 1538.5 a de novo hearing on the motion to suppress evidence. This motion, more specifically, will be for the following relief.

1. To traverse and quash the aforementioned search warrant;
2. To suppress and return any evidence or the fruits thereof seized pursuant to or under the purported authority of the aforementioned search warrant, including but not limited to each of the items listed on the return thereto;
3. To suppress all observations, statements, confessions, admissions or other evidence, or any fruits thereof seized during the execution of said warrant;
4. For an evidentiary hearing to contest various factual misstatements contained within the affidavit of Robert Henley, and to strike from such affidavit various items of evidence obtained as a result of an illegal search and seizure.
5. For a de novo hearing to determine the legality of the search and seizure of various items of evidence intended to be introduced by the

People in the trial of the instant case.

This motion will be made upon the following grounds:

1. That the affidavit in support of the search warrant is insufficient to establish probable cause that a crime has been committed or that the property to be seized is at the location to be searched;
2. That the warrant is overbroad and general and that it fails to particularly describe the property to be seized in violation of the Fourth Amendment to the United States Constitution, Article I Section 19 of the California Constitution; and California Penal Code Section 1525;
3. That the execution of the warrant and the seizure of material thereunder was overbroad and in violation of the Fourth Amendment to the United States Constitution and Article I Section 19 of the California Constitution;
4. That various material misrepresentations contained in the affidavit, and relied upon in support of probable cause, were factually inaccurate and/or obtained as a result of a prior illegal search and seizure.
5. That various items of evidence which the People intend to introduce at the trial of the instant matter were obtained as the result of an illegal search and seizure.

This motion is brought pursuant to the authority of California Penal Code Section 1538.5, 1539 and 1540 and is based upon the records and files of the instant case, the

aforementioned search warrant, the affidavit in support thereof, the return thereto, this Notice of Motion, the points and authorities attached hereto and any further oral or documentary evidence, including any further points and authorities as may be introduced at the time of the hearing on this motion.

DATED: July 27, 1978

MICHAEL NASATIR

Nasatir, Sherman & Hirsch
9911 West Pico Boulevard, Suite 1000
Los Angeles, California 90035
Telephone (213) 277-3112
Attorneys for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

The Defendant hereby specifically reserves the right to produce additional authorities upon the issues raised herein but outlines for the convenience of the court and counsel the primary issues to be raised upon this motion to quash.

I

THE AFFIDAVIT RELIES UPON CONSTITUTIONAL INSUFFICIENT HEARSAY INFORMANT INFORMATION.

Aguilar v. Texas, 378 U.S. 108 (1964);
Spinelli v. United States, 393 U.S. 410 (1969);
Alexander v. Superior Court, 9 C 3d 387 (1973).

II

THE SEARCH WARRANT IS OVERBROAD AND IN VIOLATION OF THE CALIFORNIA AND FEDERAL CONSTITUTIONS IN THAT IT DOES NOT PARTICULARLY DESCRIBE THE ITEMS TO BE SEIZED.

Marron v. United States, 275 U.S. 192 (1927);
Aday v. Superior Court, 55 C 2d 789 (1961);
Griffin v. Superior Court, 26 C A 3d 372 (1972);
Burrows v. Superior Court, 13 C 3d 228 (1974).

III

THE AFFIDAVIT IN SUPPORT OF THE WARRANT FAILS TO ESTABLISH PROBABLE CAUSE TO BELIEVE THAT THE ITEMS TO BE SEIZED ARE AT THE LOCATION TO BE SEARCHED.

Alexander v. Superior Court, supra;
Burrows v. Superior Court, supra.

IV

THE DEFENDANT REQUESTS AN EVIDENTIARY HEARING TO TRAVERSE THE WARRANT WITH REGARD TO MATERIAL MISSTATEMENTS AND WITH REGARD TO RELIANCE UPON EVIDENCE ILLEGALLY SEIZED.

Theodore v. Superior Court, 8 C 3d 77 (1972).

CONCLUSION

For the reasons cited above it is respectfully submitted

that the instant warrant should be traversed and quashed.

DATED: July 27, 1978.

Respectfully submitted,

MICHAEL D. NASATIR

†

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on DECEMBER , 1980, I served the wtihin PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

ATTORNEY GENERAL
STATE OF CALIFORNIA
3580 Wilshire Boulevard, Room 800
Los Angeles, California 90010 (3 copies)

CLERK, SUPERIOR COURT OF LOS ANGELES COUNTY
111 North Hill Street
Los Angeles, California 90012
Ref. Case No. A 341638
Hon. Stanley R. Malone, Jr., Judge Presiding
(1 copy)

I declare under penalty of perjury that the foregoing is true and correct.

Executed on DECEMBER 1980, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

DEAN-STANDEFER, 326½ Main St., Huntington Beach, Ca.
(714) 536-7161

NO. 80-1032

IN THE

MAR 27 19
ALEXANDER L. ST
CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1980

FRANCIS DUANE GARTNER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF OF RESPONDENT IN OPPOSITION

GEORGE DEUKMEJIAN, Attorney General
of the State of California
ROBERT H. PHILIBOSIAN, Chief
Assistant Attorney General
--Criminal Division
S. CLARK MOORE,
Assistant Attorney General
ROBERT F. KATZ,
SHUNJI ASARI,
MARK ALAN HART,
Deputy Attorneys General

3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2226

Attorneys for Respondent

Question Presented

May a law enforcement officer engage in a warrantless inspection of a box of documents revealed to him by a citizen-informant known not to be the owner of the documents, where the officer observes no more than that already observed by the citizen-informant?

TOPICAL INDEX

Page

Question Presented 1

Statement of the Case 2

I

A Law Enforcement Officer's Warrantless Observations of Documents Revealed to him by a Citizen-Informant Known not to be the Owner of the Documents, is Proper Where the Officer Observes no More Than That Already Observed by the Citizen-Informant 5

II

This Honorable Court Should not Grant a Writ of Certiorari to Review a Ruling on a Pretrial Motion Heard Prior to the Entry of a Plea of Nolo Contendere 21

Conclusion 28

TABLE OF AUTHORITIES

Cases	Page
Arkansas v. Sanders (1979) 442 U.S. 753	20-21
Boykin v. Alabama (1969) 395 U.S. 238	22
Brady v. United States (1970) 397 U.S. 742	22
Brotherhood of Carpenters v. United States (1947) 330 U.S. 395	23
Burdeau v. McDowell (1921) 265 U.S. 465	6
Chapman v. California (1967) 386 U.S. 18	25
Coolidge v. New Hampshire (1971) 403 U.S. 443	6-7
Corngold v. United States (9th Cir. 1966) 367 F.2d 1	20
Elkins v. United States (1960) 364 U.S. 206	16
Harrington v. California (1969) 395 U.S. 250	25
Marshall v. United States (9th Cir. 1965) 352 F.2d 1013	19
McMann v. Richardson (1970) 397 U.S. 759	22,23-24
Menna v. New York (1975) 423 U.S. 61	24-25,26

North Carolina v. Alford (1970)
400 U.S. 25 22

Santobello v. New York (1971)
404 U.S. 257 23

Stanley v. Georgia (1969)
394 U.S. 557 9

United States v. Bulgier (7th Cir.
1980) 618 F.2d 472 17

United States v. Chadwick (1976)
433 U.S. 1 21

United States v. Foley (4th Cir.
1979) 598 F.2d 1323 18

United States v. Frankfort Distilleries
(1945) 324 S. 293 22

United States v. McDaniel (5th Cir.
1978) 574 F.2d 1224 17

United States v. Newton (7th Cir.
1975) 510 F.2d 1149 19-20

United States v. Norris (1930)
281 U.S. 619 22

United States v. Pryba (D.C. Cir.
1974) 502 F.2d 391 17

United States v. Ziperstein (7th Cir.
1979) 601 F.2d 281 16,17

Walter v. United States (1980) ___
U.S. ___, 100 S.Ct. 2395 ... 7,8,9,21

Statute

California Penal Code
Section 1538.5 26

Constitutions

United States Constitution

Fourth Amendment 7,15,17

Fourteenth Amendment 16

NO. 80-1032

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

FRANCIS DUANE GARTNER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION

Question Presented

May a law enforcement officer engage in a warrantless inspection of a box of documents revealed to him by a citizen-informant known not to be the owner of the documents, where the officer observes no more than that already observed by the citizen-informant?

* * * *

Statement of the Case

In an information filed by the District Attorney of Los Angeles County, California, petitioner was charged with 14 counts of grand theft, in violation of California Penal Code section 487, subdivision 1, and with 9 counts of forgery, in violation of California Penal Code section 470. (C.T. pp. 980-1004.)[1/] Petitioner pleaded not guilty. (C.T. p. 1005.)

Petitioner's motions to suppress evidence, and to quash and traverse a search warrant, were denied. (C.T. p. 1194.)[2/]

---

1. "C.T." refers to the Clerk's Transcript included as part of the record on appeal in the state courts.

2. The constitutional provisions and California statutes relevant to petitioner's claim of error in denying (cont.)

Thereafter, petitioner withdrew his plea of not guilty and pleaded nolo contendere to one count of grand theft and one count of forgery. (C.T. p. 1194.)

Petitioner's renewed motion to suppress evidence, following his plea of guilty, was denied. (C.T. p. 1195.)

Proceedings were suspended and petitioner was granted probation for a period of 5 years with terms and conditions including that he spend the first 180 days in county jail. The remaining counts were dismissed on motion of the People. (C.T. p. 1195.) Petitioner was granted bail on appeal, and the county jail condition was stayed pending appeal. (C.T. pp. 1195-1196.)

---

these motions are set forth in Appendix D to the Petition for Writ of Certiorari.

On August 4, 1980, in an opinion certified for publication and a separate memorandum not certified for publication, the judgment was affirmed by the California Court of Appeal, Second Appellate District, Division Two. (2 Crim. 35858; Petn. for Writ of Cert., Appen. B.) On August 19, 1980, petitioner's request for rehearing was denied by the California Court of Appeal. On September 2, 1980, the California Court of Appeal ordered its two opinions consolidated, and ordered that they not be published. On October 22, 1980, the California Supreme Court denied petitioner's request for hearing. (Petn. for Writ of Cert., Appen. C.)

* * * *

ARGUMENT

I

A Law Enforcement Officer's Warrantless Observations of Documents Revealed to him by a Citizen-Informant Known not to be the Owner of the Documents, is Proper Where the Officer Observes no More Than That Already Observed by the Citizen-Informant.

Petitioner was the owner of a fire and casualty insurance business which he sold to Jack Robert Boyer. As part of the transaction, Mr. Boyer took possession of all documents regarding policies handled by the business, and a box of documents belonging to petitioner inadvertently left with Mr. Boyer. Mr. Boyer opened the box, inspected the documents inside, and voluntarily showed them to a deputy sheriff of Los Angeles County, California. The deputy inspected the materials to the extent that they had been previously inspected by Mr. Boyer, and made copies of some of the

documents. From these observations, the deputy compiled a list of 177 insurance policy-holders whose refunds due them appeared to have been appropriated by petitioner for his own benefit, and discovered some cases where petitioner used refunds to pay for life insurance policies taken out on the policy-holders where the policy-holders had never applied for such life insurance. The deputy's observations were included in an affidavit in support of a warrant to search petitioner's business premises.

It is well-settled that actions of a private party in seizing evidence will not be attributed to the government for Fourth Amendment purposes when the private party turns the evidence over to the government. (Burdeau v. McDowell (1921) 265 U.S. 465, 475; see also Coolidge v. New Hampshire (1971) 403

U.S. 443, 487-490.) In this Honorable Court's most recent consideration of the subject, eight Justices affirmed the rule that where such evidence is made available to the plain view of law enforcement agents by a private citizen, it is not subject to suppression under the Fourth Amendment. (See Walter v. United States (1980) ___ U.S. ___, 100 S.Ct. 2395, 2398 - 2403; id., at pp. 2403-2404, White, J., conc., and pp. 2404-2406, Blackmun, J., dis.) Petitioner contends that a search by the government of a package previously examined but then closed by a private party is unlawful. He acknowledges that this question was left unresolved in Walter. (Petn. for Writ of Cert., p. 7; see also Walter v. United States, supra, at p. 2402, fn. 9; and id., at p. 2404, fn. 3, White, J., conc.) Respondent submits first, that the evidence shown

to law enforcement in the instant case was in plain view and falls within the scope of what was acceptable in Walter. Furthermore, the government agent acted properly in viewing no more than had been previously viewed by the citizen-informant.

In Walter v. United States, supra, 12 sealed packages containing 871 boxes of 8 millimeter film depicting homosexual activities were shipped by private carrier and mistakenly delivered to the wrong party. Employees of that party opened the packages, found suggestive drawings and explicit descriptions of the contents on individual film boxes, and contacted the FBI. Federal agents picked up the packages and, without obtaining a warrant, viewed the films with a projector. This led to indictments on obscenity charges relating to

interstate transportation of 5 of the 871 films. (Id., at pp. 2398-2400.) In its lead opinion, this Court stated that exhibition of the films was an unreasonable invasion of the owner's constitutional right of privacy. Citing Justice Stewart's concurring opinion in Stanley v. Georgia (1969) 394 U.S. 557, 569, the opinion noted that the film could not be inspected as plain view evidence since inspection required use of a projector. The fact that federal agents were lawfully in possession of the film did not give them authority to search the contents. An officer's authority to possess a package was held distinct from the authority to examine the contents, and although there was nothing wrongful about the agents' acquisition of the packages or examination of their contents to the extent that they had already been examined by

third parties, the agents improperly exceeded the scope of the private search when they viewed the films on a projector. (Id., at pp. 2400-2403.)

Contrary to petitioner's contention, the instant record establishes not only that the inspection of petitioner's documents by a law enforcement agent was no more extensive than the inspection already made by the citizen-informant, but also that the law enforcement agent observed only that which was specifically shown to him by the citizen-informant. Thus, the instant search did not exceed the plain view exception endorsed by this Honorable Court for evidence revealed to law enforcement by a private party where government agents see no more than what the private party had exposed to their view.

The instant record establishes that the citizen-informant showed the

sheriff's deputy ledger cards, books, and other documents from the box that had been left in the informant's possession by petitioner. (C.T. pp. 465-466.) In fact, the citizen-informant conducted the inspection by showing the contents of the box in question to the deputy sheriff.

"Q. [by defense counsel] You were also shown some records at that time, weren't you?

A. [by deputy sheriff] Right.

Q. Where were you shown those records?

A. It was in an office, just adjacent to Mr. Boyer's office [the citizen-informant].

Q. And what did the records look like when you were shown them?

A. <u>They were taken from a box</u>, and in the particular records that I was really interested in, I believe, they

were in a Manila folder, and there was maybe 100 to 200 pieces of paper in there with various clients, credit memos and dailies from the insurance companies.

Q. You were also shown -- did that envelope come from a particular box?

A. There was a box. I believe it was labeled 1974 records.

Q. And those records came from a box that was in that envelope, didn't they?

A. Right.

Q. Additionally, what else was on that label?

A. I couldn't say, possibly Duane Gartner & Company.

Q. Did it have any title on it, like accounting records, or Duane Gartner accounting records?

A. I can't recall.

"Now, that I think about it, I could

not even say for certain it was a box. It may have been a file drawer. I believe it was a box, but it could possibly be a file drawer full of records.

"Q. <u>But the records that he showed you that day all came out of the same either box or file drawer</u>?

A. Right, not a metal file drawer, one of these cardboard storage bins.

Q. Like a moving company would have?

A. Right.

Q. Do you remember the label, 1974, being on the box at least?

A. Right.

Q. Prior to being shown the records from that box, you had a conversation with Mr. Boyer, didn't you?

A. Yes.

Q. And in that conversation he

told you that he had inadvertently come into possession of some records during the sale of some business?

A. Right, that the box of records had been there by mistake, left by the moving people.

Q. He told you that the box of records were Duane Gartner's, didn't he?

A. Yes.

Q. He told you that by inadvertently, that meant to you that that box of records had been included in by mistake in the records that had been sent to Mr. Boyer?

A. Right.

Q. And at that time Mr. Boyer -- after this conversation, then you proceeded to review the records in the box?

A. Yes.

Q. And what did you do with them,

sir, if anything?

A. What did I do with the records?

Q. Yes.

A. Well, I looked through them, and Mr. Boyer gave me copies of maybe 100 of them.

Q. Did you make copies, or did he make the copies?

A. Well, I don't -- I am sure I didn't. I don't know whether he did or Camille may have.

Q. Did you pick out certain records and ask him to make copies of them?

A. I believe he made a copy of most everything that was in the Manila folder." (C.T. pp. 502-504; emphasis added.)

Respondent submits that the instant inspection was not an unreasonable search and seizure, in violation of the Fourth Amendment, made applicable to the

states by the Fourteenth Amendment. "The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter - to compel respect for the constitutional guarantee in the only effectively available way - by removing the incentive to disregard it." (Elkins v. United States (1960) 364 U.S. 206, 217.) The rule has no application to evidence voluntarily placed in the plain view of law enforcement officers by a private citizen. For example, in United States v. Ziperstein (7th Cir. 1979) 601 F.2d 281, pharmaceutical records were turned over to the government by a pharmacist employed by one of the defendants. The Court held that even if the employee had no authority over the records and the defendant had a reasonable expectation of privacy in the records, the records should not be suppressed since the government was not

involved in any impropriety in gaining the records. (Id., at p. 290.) Similarly, in United States v. Bulgier (7th Cir. 1980) 618 F.2d 472, a search of luggage by airport personnel prior to the government's involvement was held to be a private search not protected by the Fourth Amendment. Thereafter,

> "[t]he reopening and reinspection of the contents of a container by or in the presence of government authorities following a private search of the same container does not constitute a separate, independent search requiring a warrant." (Id., at p. 478; see also United States v. McDaniel (5th Cir. 1978) 574 F.2d 1224, 1225-1227, cert. den. 441 U.S. 952 (1979); and, United States v. Pryba (D.C. Cir. 1974) 502 F.2d 391, 398, cert. den. 419 U.S. 1127 (1975).)

The manner in which the private

citizen obtained the documents does not taint the government's acquisition of them. For example, in United States v. Foley (4th Cir. 1979) 598 F.2d 1323, a letter that was the subject of a protective order in a civil matter was turned over to the government and used in a criminal matter. The Court held that "[t]he government is not precluded from introducing improperly obtained evidence so long as it did not participate in the impropriety." (Id., at p. 1337.)

It is submitted that a bailee has a right not to be used as an unwilling depository of incriminating evidence or as an unwilling participant in the concealment of such evidence. Upon learning of the incriminating nature of the documents left in his possession, the citizen-informant's only reasonable course of conduct was to make the

materials available to law enforcement agents. The government can hardly be required to look the other way when such evidence is presented for plain view inspection. (See Marshall v. United States (9th Cir. 1965) 352 F.2d 1013, 1014-1015 (defendant gave his landlady an unlocked suitcase which she turned over to the FBI contrary to defendant's instructions).)

Petitioner maintains that the instant case presents an opportunity to resolve a conflict in the circuits regarding the extent of a warrantless government search following a search by a private party. (Petn. for Writ of Cert., pp. 7-8.) On the contrary, the circuit courts of appeal have generally upheld such searches except when the private party acted under color of government authority. (See, e.g., United States v. Newton (7th Cir. 1975) 510 F.2d 1149,

1153-1154; Corngold v. United States (9th Cir. 1966) 367 F.2d 1, 4-5.) In the case at bar, the citizen-informant examined the records in question when he purchased petitioner's business. (See Petn. for Writ of Cert., Appen. B, p. 4.) He did not act as a state agent when he discovered the incriminating documents.

A fair reading of the record made in the state courts leads inexorably to the conclusion that petitioner's records were not effectively under the control of law enforcement during the search. Rather, the citizen-informant made copies of the records available to the government agent. (See C.T. pp. 502-504, quoted supra.) Thus, petitioner's reliance on cases dealing with containers within the control of law enforcement is misplaced. (Petn. for Writ of Cert., p. 9; Arkansas v. Sanders

(1979) 442 U.S. 753; United States v. Chadwick (1976) 433 U.S. 1.)

Clearly, the instant matter fails to present any important federal question for resolution. The decision below is consistent with Walter v. United States, supra, and no questions left undecided in Walter are raised by the instant facts.

II

This Honorable Court Should not Grant a Writ of Certiorari to Review a Ruling on a Pretrial Motion Heard Prior to the Entry of a Plea of Nolo Contendere

Petitioner is asking this Court to render a decision on the admissibility of evidence never actually admitted in a state criminal trial. Following the denial of petitioner's pretrial motion to suppress evidence obtained pursuant to the instant search and seizure, petitioner elected not to go to trial (where the evidence in question may or

may not have been admitted on the issue of guilt), and pleaded nolo contendere, the functional equivalent of a guilty plea for the purposes of criminal law.

It is well-settled that a plea of guilty or nolo contendere is a waiver of trial and an admission of every element of the offense charged. (See Brady v. United States (1970) 397 U.S. 742, 748; McMann v. Richardson (1970) 397 U.S. 759, 766; Boykin v. Alabama (1969) 395 U.S. 238, 242, 242-243, fns. 4 & 5; United States v. Frankfort Distilleries (1945) 324 U.S. 293, 296; United States v. Norris (1930) 281 U.S. 619, 622.) Such a plea is proper if it represents a voluntary and intelligent choice among the alternatives open to the defendant. (North Carolina v. Alford (1970) 400 U.S. 25, 31.) Federal constitutional rights may be waived by such a plea (see Boykin v. Alabama, supra, at p. 243),

and a defendant who pleads guilty pursuant to a plea bargain is entitled only to what he bargained for. (Santobello v. New York (1971) 404 U.S. 257, 262.) He may not, by right, litigate all federal constitutional rights raised in pre-plea proceedings. "Ordinarily a plea of nolo contendere leaves open for review only the sufficiency of an indictment." (Brotherhood of Carpenters v. United States (1947) 330 U.S. 395, 412.)

In McMann v. Richardson, supra, this Court held that admissibility of an allegedly coerced confession could not be reviewed on habeas corpus following defendant's plea of guilty. Unless applicable state law provides otherwise, the plea is a waiver of the right to contest any evidence the state might have offered against the defendant. (McMann v. Richardson, supra, 397 U.S.

at p. 766.) While a defendant who pleads guilty does not waive all antecedent constitutional violations, a guilty plea does generally limit appellate review to claimed constitutional violations not inconsistent with the factual admission of guilt which a guilty plea involves.

"[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established."

(Menna v. New York (1975) 423 U.S. 61, 62-63, fn. 2.)

Petitioner herein unsuccessfully sought to exclude evidence prior to his plea of nolo contendere on the ground that the evidence was the product of an illegal search and seizure. Had he proceeded to trial, suffered a conviction and filed an appeal, a finding of an unlawful search and seizure would not per se result in a reversal. The rule is settled that if the erroneously admitted evidence was harmless beyond a reasonable doubt, e.g., there was overwhelming independent evidence of guilt, petitioner's conviction would be sustained. (See Harrington v. California (1969) 395 U.S. 250, 251-254; Chapman v. California (1967) 386 U.S. 18, 21-24.)

Respondent submits that petitioner's voluntary and intelligent nolo contendere plea following denial of his

motion to suppress provided the requisite overwhelming evidence of guilt which rendered irrelevant the constitutional violations of which he complains. In this regard the instant case differs from Menna v. New York, supra, at page 67, footnote 2, where this Court held that a guilty plea does not bar consideration of a double-jeopardy claim since the issue is whether the State may convict the defendant no matter how validly factual guilt is established. (Menna v. New York, supra, 423 U.S. at p. 63, fn. 2.)

Respondent acknowledges that California has, by statute, provided for appellate review of the denial of a pretrial motion to suppress evidence, notwithstanding the fact that the defendant pleaded guilty. (Cal. Pen. Code, § 1538.5(m).) This statutory right is not, however, constitutionally

mandated. When a criminal defendant admits, by way of a plea, every element of the charged offense, this Court should decline to review claims of constitutional error which are rendered moot by the plea.

Respondent submits that this Court should therefore deny the requested writ of certiorari to review the admissibility of evidence litigated in petitioner's pretrial motion to suppress evidence.

* * * *

CONCLUSION

For the foregoing reasons, respondent urges that the Petition for Writ of Ceriorari be denied.

Respectfully submitted,

GEORGE DEUKMEJIAN, Attorney General
of the State of California
ROBERT H. PHILIBOSIAN, Chief
Assistant Attorney General
--Criminal Division
S. CLARK MOORE,
Assistant Attorney General
ROBERT F. KATZ,
SHUNJI ASARI,
MARK ALAN HART,
Deputy Attorneys General
and Attorney of Record

Attorneys for Respondent